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Supreme Court of the United States

OCTOBER TERM, 1937

No. 761

WILLIAM MAHONEY, as Liquor Control Commissioner of the State of Minnesota, et al.,

Appellants,

vs.

JOSEPH TRINER CORPORATION,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF OF APPELLEE.

CARL W. CUMMINS,
RAY E. CUMMINS,
330 Minnesota Building,
St. Paul, Minnesota,
Counsel for Appellee.

Review Publishing Co., 141 E. Fifth St., St. Paul, Minn.

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BRIEF OF APPELLEE.

SUMMARY OF ARGUMENT.

I.

THE TWENTY-FIRST AMENDMENT.

The adoption of the Twenty-first Amendment to the Constitution of the United States did not add to nor detract from the police power of the States over traffic in intoxicating liquors, as limited by Section 1 of Article 14 of the Constitution. The Amendment did no more than free the States from restrictions imposed by the Commerce Clause, Article 1, Section 8, Clause 3 of the Federal Constitution.

II.

THE FOURTEENTH AMENDMENT.

Chapter 390, Laws of Minnesota for 1935, contravenes the "equal protection" clause of Article 14, Section 1 of the Constitution of the United States, in that it is arbitrary, unreasonable and discriminatory, and exceeds a proper and legitimate exercise of the police power.

ARGUMENT.

The appellants contend upon this appeal, that Chapter 390, Laws of Minnesota, 1935, does not contravene the following provisions of the Constitution of the United States:

I. The Commerce Clause, Article 1, Section 8, Clause 3.

II. The Equal Protection Clause, Article 14, Section 1.

III. The Freedom of Contract Clause, Article 1, Section 10.

IV. The Due Process Clause, Article 14, Section 1.

The above contentions present issues that were not urged or passed upon by the Trial Court. It is true that upon the application for an interlocutory injunction the plaintiff urged that the Statute in question infringed upon the Commerce Clause of the Constitution, but before a hearing was had upon the merits, this Court decided the case of *State Board of Equalization of California vs. Young's Market Co.*, 299 U. S. 59. The Trial Court, with due deference to that opinion, did not hold that the Statute in question contravened the Commerce Clause. It was not urged in the lower Court, nor did that Court find that the Statute in question contra-

vened either the "contract" clause or the "due process" clause of the Constitution, and we make no such contention here.

For the purpose of making it clear as to the questions decided by the lower Court, we quote from that Court's opinion, 20 Federal Supp. 1019, on Page 1021:

> "It is to be noted, however, that the Supreme Court expressly found it unnecessary to declare that the Twenty-first Amendment, with respect to liquor, had freed the states from all restrictions upon their police power which are to be found in the Constitution of the United States. It seems fair to assume, under the circumstances, that the Supreme Court was by no means convinced that the Twenty-first Amendment left the States free from the restrictions of the equal protection clause in dealing with intoxicating liquor.
>
> We are not convinced that our conclusion that the Minnesota statute here assailed was invalid as violating the equal protection clause of the Constitution was wrong; and, in the absence of a decision of the Supreme Court of the United States holding that a state may, by virtue of the Twenty-first Amendment, impose arbitrary and unreasonable restrictions upon some importers of intoxicating liquor, which are not imposed upon others similarly situated, and which restrictions would otherwise be violative of the Fourteenth Amendment, we think this court ought not so to declare."

The issues as we view them upon this appeal are, briefly stated: Did the adoption of the Twenty-first Amendment deprive the plaintiff of the protection vouchsafed to it by the Fourteenth Amendment? and Does the Statute in question contravene the "equal protection" clause of Article 14, Section 1 of the Constitution?

It is our purpose to consider first the Twenty-first Amendment, and second the Fourteenth Amendment and its bearing upon the Statute here involved.

I.

THE TWENTY-FIRST AMENDMENT.

For years prior to the adoption of the Eighteenth Amendment, the dry States were powerless to fully protect their publicly declared policy of prohibition, due to the Commerce Clause of the Constitution. To obviate the difficulties experienced, and the decisions of the Courts construing the Commerce Clause in cases involving intoxicating liquor, the Wilson Act was passed by Congress on August 8, 1890 (26 Stat. 313). This Statute did not, however, free the States of intoxicating liquors moving in interstate commerce.

To afford them further protection, the Webb-Kenyon Act was adopted in 1913. This Statute simply extended the scope of the Wilson Act. *Adams Express Co. vs. Kentucky*, 238 U. S. 190; *James Clark Distilling Co. vs. Western Maryland Railway Co.*, 242 U. S. 311.

Neither Statute had any effect upon the restrictions imposed upon the States under the Fourteenth Amendment. Congress had no power to enact any such legislation. If it did have, Congress, and not the Constitution, would be supreme.

Owing to the fact that the Webb-Kenyon law had been sustained on constitutional grounds by a divided Court, in *James Clark Distilling Co. vs. Western Maryland Railway Co.*, 242 U. S. 311, and was subject to repeal at any time by Congress, when the adoption of an amendment to the Constitution for the purpose of repealing the Eighteenth Amendment was before Congress for consideration, it was deemed advisable that the repealing amendment should incorporate the provisions of the Webb-Kenyon Act. The debates in Congress show that such was the intention.

On pages 4170-4172, Volume 76 of the Congressional Record, Senator Borah in discussing the proposed Twenty-first Amendment said:

> "Sec. 2 is to protect the dry states. This amendment is vital. It has been said that the Webb-Kenyon Act is a sufficient protection to the dry states. The Webb-Kenyon Act was sustained by the Supreme Court by a divided court. President Taft (afterwards Chief Justice) vetoed it on the ground that it was unconstitutional. The Attorney-General rendered an opinion that it was unconstitutional. Mr. Justice Sutherland, then a Senator and now on the Supreme Court, argued before the Senate that it was unconstitutional. Therefore we are turning the dry states over for protection to a law which is still of doubtful constitutionality and which might be held unconstitutional upon re-presentation of it. Secondly, we are asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law. Under the Wilson Act as well as before the liquor interests corrupted the states. * * * All this was sought to be remedied by the Webb-Kenyon Act and I am very glad that it is to be permanently incorporated into the Constitution."

Senator Blaine, on behalf of the Senate Judiciary Committee, at pages 4140-4141, Volume 76 of the Congressional Record, made the following remarks:

> "The committee was unanimous that the language used would effectuate the purpose that is obviously designed by Sec. 2. It is claimed however and with some degree of assurance for the future that Congress now has the power to protect the so-called dry states in the regulation of intoxicating liquors. * * * The Clark case was a divided opinion. * * * There has been a divided opinion in respect to the earlier cases and that division of opinion seems to have come down to a very late day, so as to assure the so-called dry states against

importation of intoxicating liquors into those states it is proposed to write permanently into the Constitution a prohibition along that line."

A speech of Jouett Shouse, incorporated in Volume 76 of the Congressional Record, page 2198, contains the following:

"Sec. Two (The Webb-Kenyon re-enactment) is superfluous. It would seek to put into the Constitution the protection for the so-called dry states against shipment of liquor from outside. The power to afford such protection is already inherent in Congress under the commerce clause of the Constitution and legislation with this in view has been on the statute books for years as embodied in the Webb-Kenyon law. * * * It was upheld as a right of Congress under the commerce clause to pass all legislation to protect the States whose laws prohibit the importation or sale of liquor. I have no quarrel with the clause."

The above quotations from the Congressional Record show a desire on the part of Congress to give permanency to the provisions of the Webb-Kenyon Act.

A comparison of the language of the act and the amendment throws light on the purpose of the latter. The Webb-Kenyon Act, with extraneous words omitted, reads:

"The shipment or transportation * * * of * * * intoxicating liquor * * * from one state * * * into any other state * * * which intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used either in the original package or otherwise, in violation of any law of such state, is hereby prohibited." (37 Stat. 699).

The second section of the Twenty-first Amendment provides:

> "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited."

It will be observed that both the Amendment and the Webb-Kenyon Act prohibit the importation into a State of intoxicating liquors in violation of the laws thereof. The language used in each is practically identical. There is no intimation that it was the purpose of Congress to in any way disturb the provisions of the Fourteenth Amendment.

The evils sought to be reached by the Wilson Act and the Webb-Kenyon Act, arose under the restrictions imposed upon the States by the Commerce Clause. Those evils prompted the Twenty-first Amendment. Therefore, in construing the latter, it is proper to take into consideration the mischief sought to be prevented.

Craig vs. Missouri, 4 Pet. 410.

The condition of affairs out of which the Twenty-first Amendment arose, suggests that the language therein used should be so construed as to forward the known purpose of the amendment.

Maxwell vs. Dow, 176 U. S. 581.

We take it to be sound law that one constitutional provision should not be construed to nullify another unless absolutely required by its context.

Marbury vs. Madison, 1 Cranch 137.

In the case of *Billings vs. U. S.*, 232 U. S. 261, Chief Justice White, speaking for this Court, said:

> "It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immed-

iately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution or the Amendments thereto, especially by the due process clause of the 5th Amendment."

With the above principles before us, we look to the language of the Twenty-first Amendment. Section 1, by express language, repeals the Eighteenth Amendment, and by the second section clearly unburdens the States from the Commerce Clause, but there is no language which either directly or by implication makes reference to the Fourteenth Amendment. If Congress had intended to abrogate the Fourteenth Amendment, it would undoubtedly have used apt language for that purpose. It did so as to the Eighteenth Amendment and the Commerce Clause. The phrase "in violation of the laws thereof" means laws which would be void as burdening commerce, without the Twenty-first Amendment or appropriate legislation such as the Webb-Kenyon Act. It certainly does not mean that a state may now enact legislation without any restriction whatever. Such a construction would create a condition more intolerable than the one which the amendment was designed to remove. Each State would be freed to enact reprisal statutes and arbitrary and discriminatory regulations of all kinds against its own citizens and citizens of other states without limitation.

There is just as much reason and logic to support a claim that the Twenty-first Amendment repealed the entire Fourteenth Amendment in so far as the liquor business is concerned, as to support the argument advanced here. If a person engaged in the liquor business is no longer entitled "to the equal protection of the law", it follows that his property may be taken from him without "due process of law."

Let us assume that the Legislature of Minnesota enacts a statute authorizing the State to engage in the manufacture of intoxicating liquors in competition with private capital, and empowers the liquor control Commissioner, without notice, hearing or compensation to seize and appropriate any distillery in Minnesota owned by a citizen of another State who is lawfully operating the same. Would the Fourteenth Amendment afford the distillery owner protection? The answer is obviously yes, unless the Twenty-first Amendment has destroyed that protection.

Let us assume that a law is enacted in Minnesota authorizing the entry of judgment in an action involving the purchase price of liquor lawfully sold, by merely filing a complaint and without serving notice or process on the defendant. Would the "due process" clause afford the defendant protection? Certainly, unless that protection has been taken away by the Twenty-first Amendment.

This Court was first called upon to construe the Twenty-first Amendment in the case of *Premier-Pabst Sales Co. vs. Grosscup*, 298 U. S. 226. With reference to the constitutional questions there raised, the Court said:

> "We have no occasion to consider the constitutional question, because it appears that the plaintiff is without standing to present it. One who would strike down a state statute as obnoxious to the Federal Constitution, must show that the alleged unconstitutional feature injures him."

The only other case in this Court having to do with the Twenty-first Amendment is that of *State Board of Equalization of California, et al. vs. Young's Market Co.*, 299 U. S. 59. During the course of the opinion, the Court said:

> "The main contention of the plaintiffs is that the exaction of the importer's license fee violates the commerce clause by discriminating against the wholesaler of imported beer."

This quotation clearly shows that the main question considered by the Court was the effect of the Twenty-first Amendment upon the Commerce Clause.

With reference to the effect of the Amendment upon the Fourteenth Amendment, the Court said:

> "The plaintiffs insist that to sustain the exaction of the importer's license fee would involve a declaration that the Amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization."

The language just quoted would seem to indicate that it was not the intention of the Court to construe the Twenty-first Amendment as removing all restrictions upon the police power of the States.

The lower Court in the instant case, 20 Fed. Supp. 1019, on Page 1020 of the opinion said:

> "We have read with great care the decision of the Supreme Court of the United States in the California case referred to. That court held that under the Twenty-first Amendment a state may exact a license fee for the privilege of importing beer from other states; that the Twenty-First Amendment abrogated the right to import free so far as intoxicating liquors were concerned; and that the imposition of the importer's license fee by the state of California was not in violation of the commerce clause of the Federal Constitution. The contention that the California statute violated the equal protection clause, the Supreme Court disposed of in the

following language (299 U. S. 59, at page 64, 57 S. Ct. 77, 79, 81 L. Ed. 38): 'Second. The claim that the statutory provisions and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth. Moreover, the classification in taxation made by California rests on conditions requiring difference in treatment. Beer sold within the state comes from two sources. The brewer of the domestic article may be required to pay a license fee for the privilege of manufacturing it; and under the California statute is obliged to pay $750 a year. Compair Brown-Forman Co. vs. Kentucky, 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The brewer of the foreign article cannot be so taxed; only the importer can be reached. He is subjected to a license-fee of $500. Compare Kidd v. Alabama, 188 U. S. 730, 732, 23 S. Ct. 401, 47 L. Ed. 669.'

In discussing the claim that the statute violated the commerce clause, the Supreme Court made this statement (299 U. S. 59, at page 62, 57 S. Ct. 77, 78, 81 L. Ed. 38): 'The amendment which "prohibited" the "transportation or importation" of intoxicating liquors into any state "in violation of the laws thereof," abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes.'

If that language be construed to mean that a state may impose any conditions with respect to importations of intoxicating liquors, whether arbitrary and unreasonable or not, it sustains the contention which the defendants here make that, regardless of whether the statute of Minnesota has a reasonable or an unreasonable relation to the subject-matter, it must, nevertheless, be sustained. It is to be noted, however, that the Supreme Court expressly found it unnecessary to declare that the Twenty-First Amendment, with respect to liquor, had

freed the States from all restrictions upon their police power which are to be found in the Constitution of the United States. It seems fair to assume, under the circumstances, that the Supreme Court was by no means convinced that the Twenty-First Amendment left the States free from the restrictions of the equal protection clause in dealing with intoxicating liquor.

We are not convinced that our conclusion that the Minnesota statute here assailed was invalid as violating the equal protection clause of the Constitution was wrong; and, in the absence of a decision of the Supreme Court of the United States holding that a state may, by virtue of the Twenty-First Amendment, impose arbitrary and unreasonable restrictions upon some importers of intoxicating liquor which are not imposed upon others similarly situated, and which restrictions would otherwise be violative of the Fourteenth Amendment, we think this court ought not so to declare."

In the case of *Shore vs. Cross,* 7 Fed. Supp. 70, a three-judge Federal Court had before it for consideration, a Statute of the State of Connecticut, which was challenged on the ground that it deprived the plaintiff of the equal protection of the laws. In that case the Court held the Connecticut Statute was not discriminatory, but during the course of the opinion said:

"To be sure, even in its control of the liquor traffic, the Legislature could not resort to classifications that were wholly arbitrary and without any reasonable relation to the public welfare."

The above case was decided after the adoption of the Twenty-first Amendment.

In the case of *Sancho vs. Corona Brewing Corporation,* 89 Fed. (2d) 479, the Circuit Court of Appeals of the First Circuit said:

"The Twenty-First Amendment simply withdraws the exclusive control of Congress, under the commerce clause (article 1, Sec. 8, cl. 3), over commerce in intoxicating liquors, when their importation is in violation of the laws of a state, territory, or possession of the United States."

In the case of *Indianapolis Brewing Company vs. the Liquor Control Commission of the State of Michigan, et al.*, decided by a three-judge Court on February 3, 1938 (opinion not yet reported), a liquor Statute of the State of Michigan was challenged on two grounds, namely: (a) that it violated the "Commerce Clause", and (b) the "equal protection" clause of the Fourteenth Amendment.

As to the first ground, the Court said:

"While the bill assails validity in respect to numerous provisions of the Federal and State Constitutions, the issue upon consideration of the decision in *State Board of Equalization vs. Youngs Market Co., et al.*, 299 U. S. 51, followed and applied by a local three judge court in *Zukaitis, et al. vs. Fitzgerald, et al.*, 18 Fed. Supp. 1000, has now been narrowed in argument and briefs to a consideration of the assailed statute in respect to invalidity under the 'Equal Protection Clause' of the Fourteenth Amendment. This is the plaintiff's main reliance."

As to the second ground the Court held that the Statute did not offend against the Fourteenth Amendment.

The decision of the lower Court which is involved in this appeal was there cited as an authority. The Court in considering the same said:

"The plaintiff relies very largely for support to its assault upon the reasonableness of the classification upon the decision of a three-judge court in Minnesota in the case of *Joseph Triner Corp. vs. Mahoney, State Liquor Control Commissioner*, 11 Fed. Supp. 145, decided

originally before the announcement of the decision in the Young's Market case but thereafter to the same effect under the style of Triner Corp. vs. Arundel, 20 Fed. Supp. 1019. It is sufficient to say that the Triner case involved a classification wholly dissimilar to that here considered, that the Minnesota court found no reasonable basis for it, while for that here involved we do."

We are advised that an appeal to this Court from the above decision is now being perfected.

The appellants cite the case of *Finch & Company vs. McKittrick,* unreported, which was decided on February 24, 1938, by a three-judge Court. A Missouri Statute was therein challenged on the grounds that (a) it violated the Commerce Clause, and (b) the "equal protection" clause of the Fourteenth Amendment.

The Court disposed of the first ground upon the authority of *State Board of Equalization of California, et al. vs. Young's Market Co.,* 299 U. S. 59. As to the second ground, the Court said:

"2. The opinion and judgment in State Board v. Young's Market Co. do not, however, dispose of the second contention made by plaintiffs. It was indeed contended in that case that the challenged California statute violated the 'equal protection' clause. The classification of that statute was: *importers* of beer and *manufacturers of beer within the state.* The statute discriminated against the first class in favor of the second class (although that discrimination perhaps was counter-balanced). The Court said: 'A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth.' But the classification which is 'recognized by the Twenty-first Amendment' is one based on a distinction between intoxicating liquors manufactured *within* and *without* a state. It

> does not authorize a distinction between intoxicating liquors all of which are manufactured in other states. The classification made by the Missouri statute must stand or fall as may be required by the general principles developed for the enforcement of the Fourteenth Amendment."

It is our information that an appeal is being perfected from the above decision to this Court.

Appellants cite *General Sales & Liquor Co. vs. Becker,* 14 Fed. Supp. 348. The Court there considered and approved of the decision of the lower court in the instant case. After reaching its conclusion as to constitutionality of the law there involved, the Court said, at page 350 of the opinion:

> "This conclusion is in complete accord with that of the District Court in Joseph Triner Corporation vs. Arundel, 11 F. Supp. 145."

The decision above cited in the Triner case was rendered upon the application for an interlocutory injunction.

The conclusion to be drawn from the authorities above cited is that the Twenty-first Amendment relieved the States from the restrictions and limitations imposed upon them by the Commerce Clause but left unimpaired the inhibitory provisions of the Fourteenth Amendment.

II.

THE FOURTEENTH AMENDMENT.

Chapter 390, Laws of Minnesota for 1935, contravenes the "equal protection" clause of Article 14, Section 1 of the Constitution of the United States, in that it is arbitrary, unreasonable and discriminatory, and exceeds the proper and legitimate exercise of the police power.

The Statute above cited provides:

> "Section 1. No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume ready for sale without further processing unless such brand or brands shall be duly registered in the patent office of the United States."

It is our purpose to first consider some general principles of law having to do with the police power and the Fourteenth Amendment, and then consider the application of the same to the Statute in question.

A.

A State has the undoubted right under the police power, to enact legislation in the interest of public health, safety and morals, and to promote the public welfare, but it cannot under guise of the police power, overthrow or impair the rights secured or protected by the Fourteenth Amendment.

In the case of *Connolly vs. Union Sewer Pipe Co.*, 184 U. S. 540, this Court said:

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary, notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States

> can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of these ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons v. Ogden,* 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Sinnot v. Davenport,* 22 How. 227, 243, 16 L. ed. 243, 247; *Missouri, K. & T. R. Co. v. Haber,* 169 U. S. 613, 626, 42 L. ed. 878, 883, 18 Sup. Ct. Rep. 488."

In the later case of *Buchanan vs. Warley,* 245 U. S. 60, the following language was used:

> "The authority of the state to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety, and welfare, is very broad, as has been affirmed in numerous and recent decisions of this court. Furthermore, the exercise of this power, embracing nearly all legislation of a local character, is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases."

It is difficult to formulate an all embracing definition of what is meant by the term "equal protection of the laws,"

but it is clear, as stated by this Court in *Missouri vs. Lewis*, 101 U. S. 22, 31, that the expression means:

> "That no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances,"

and as stated by this Court in *Barbier vs. Connolly*, 113 U. S. 27, 31, that:

> "The 14th Amendment, in declaring that no State 'Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition * * *."

While the Legislature has the undoubted right to establish reasonable classifications for legislative purposes, it cannot make arbitrary classifications without denying the equal protection of the laws. A classification to be valid must affect alike, all persons in the same class and under similar conditions. There must be uniformity within the class and if persons under the same circumstances and con-

ditions are treated differently, an arbitrary discrimination results and there is a failure of proper classification. Arbitrary selection cannot be justified as a classification. This is not equal protection of the laws. *Barbier vs. Connolly,* 113 U. S. 27, 31. *Civil Rights Cases,* 109 U. S. 3. *Duncan vs. Missouri,* 152 U. S. 377. *Gulf etc. R. Co. vs. Ellis,* 165 U. S. 150. *Billings vs. Illinois,* 188 U. S. 97

Any discrimination is invalid if it is purely arbitrary, oppressive or capricious. *American Sugar Refining Company vs. Louisiana,* 179 U. S. 89.

Where a law is made applicable to one class of citizens only, it must rest upon some substantial difference between the situations of that class and others to which it does not apply. *Seaboard Air Lines vs. Seegers,* 207 U. S. 73.

B.

Minnesota is not dry territory. It licenses manufacturers and wholesalers of, and off sale and on sale retail dealers in, beer wines and distilled liquors of all kinds. A comprehensive regulatory law (Chap. 46, Extra Session Laws of Minnesota, 1934) has been enacted which makes no distinction between imported and domestic products. This law classifies manufacturers and wholesalers in one group and applies equally to resident or non-resident importers of intoxicating liquors. The license of the resident and non-resident manufacturer and wholesaler is the same. Liquor of domestic manufacture is controlled in exactly the same way as imported liquors. The Statute here involved also treats manufacturers and wholesalers as a class, but then arbitrarily discriminates in favor of the person who (a) has registered his brand in the patent office, or (b) imports liquor requiring further processing into Minnesota, or (c) is a resi-

dent manufacturer or wholesaler handling only Minnesota Products, and against the person who imports liquor without a registered brand.

The basic factor of discrimination is the requirement that brands be registered in the Patent Office. The appellee, up to the time the Statute was enacted, imported various unregistered brands into the State, many of which cannot be registered. These brands are now denied admission (R. Page 33).

The Trade Mark Act (Sec. 85, Title 15, U. S. C. A.) excludes from registration many brands which do not measure up to its requirements.

The primary and proper function of a trade mark is to identify the origin or ownership of the article to which it is affixed. *Hanover Star Milling Co. vs. Metcalf*, 240 U. S. 403.

The registration in the Patent Office simply fixes the time of the appropriation of the registrant. No substantive rights are thereby created. *U. S. Drug Co. vs. Rectanus*, 248 U. S. 90. *Trade Mark Cases*, 100 U. S. 82. *U. S. Printing and Lithographing Co. vs. Griggs, Cooper & Co.*, 279 U. S. 156.

The registration of the mark does not give any protection within a state in advance of user therein or against prior good faith users thereof. The decisions last above cited so hold.

An earlier user of a mark cannot be deprived of his rights therein by a registration thereof by another party. If this were not true, the act of registration would become a sword and not a shield. *Ubeda vs. Zialcita*, 226 U. S. 452.

Nothing in the Trade Mark Act or registration thereunder has anything to do with the kind or quality of merchandise which wears the mark.

Had the Legislature of Minnesota required the importers of intoxicating liquor to comply with a law similar to the Pure Food and Drug Act and to label their products showing compliance, there would be some basis for argument that the law was to protect public health, but the law here under consideration has no such merits. The General Liquor Control Statute of the State of Minnesota affords far greater protection to the State and consuming public than the law here challenged.

In Paragraph Six of the bill of complaint (R. Page 3) it is alleged that the appellee for the purpose of complying with the laws of the State of Minnesota and the rules and regulations of the Liquor Control Commissioner, registered and filed with said Commissioner, the various brands of liquor which the appellee proposed and intended to sell and import into the State of Minnesota. It is further alleged that the appellee furnished to said Commissioner and filed with said brands, a chemical analysis of each of the brands of liquor which were accepted and approved by the Commissioner. The appellants in their Answer admit all of the allegations of Paragraph Six of the bill of complaint (R. Page 13).

It is obvious that the requirement of the Statute here questioned can add nothing to the requirements of the Liquor Control Act. The latter Act is undoubtedly within the police power of the State. It applies uniformly to all wholesalers and importers, whether resident or non-resident.

But the law here challenged does not contain the provisions which support the validity of the Liquor Control Act. On the contrary, it, by design and operation, proceeds arbitrarily and capriciously to take from and destroy the rights of the appellee which the Fourteenth Amendment was designed to protect.

The Trial Court found, and it is not questioned here, that the appellee has spent substantial sums of money in advertising and sales promotion work in Minnesota; that it has built up and established an extensive demand for each of its brands and has developed an extensive and valuable good-will in connection therewith, and realized a substantial profit through the sale of liquor bearing the same.

Good-will is property. It is a valuable contributing aid to business. The owner of a good-will is, as this Court said in *McClean vs. Fleming*, 96 U. S. 245, 252,

> "entitled to protection as against one who attempts to deprive him of the benefits resulting from the same by using his labels and trade mark without his consent and authority."

But the Statute in question has effectively deprived the appellee of the good-will of his business in the State of Minnesota by making it possible for any manufacturer in that State to appropriate the brands of the appellee to his own use, together with all of the good-will connected therewith, and the Courts are rendered powerless to afford injunctive relief or award damages on account of such appropriation and use.

As to the brands which possess the prerequisites for registration but cannot be registered due to a prior registration by another, the appellee is forced from the State of Minnesota, although the registered owner has never transacted business therein. This situation enables the registered owner to appropriate the business of the appellee which he could not do in the absence of the Statute here assailed. There is no such difference between domestic and importing manufacturers that justifies the requirement that the brand of one and not the other be registered.

The lower Court in its opinion (*Joseph Triner Corporation vs. Mahoney*, 20 Fed. Supp. 1019) on Page 1020 thereof, said:

> "The Minnesota statute discriminates between wholesalers who handle imported brands of liquor which are not registered in the Patent Office and those who handle imported brands of liquor which are registered in the Patent Office. It discriminates between those who import liquor requiring further processing in Minnesota and those importing liquor which does not require further processing in Minnesota. Imported liquor requiring further processing in the state may be sold in the state whether the brand is registered or not, whereas the same kind and quality of liquor, if it is imported into the state ready for sale, can only be sold provided the brand is registered. Those who sell only liquor manufactured in Minnesota are not affected by the law, while those who import liquor of equal goodness may not sell it in the state unless it bears a registered brand.
>
> It seems to us that there is a vast distinction between levying a uniform license tax upon wholesalers dealing in imported liquor, and prohibiting a licensed wholesaler from dealing in imported liquor ready for sale, merely because the brand or trade-name by which the liquor is known is not registered in the Patent Office. Licensing and imposing license fees and taxes is an ancient and well-recognized method of regulating businesses of all kinds, but, so far as we are aware, no other attempt has ever been made by a state to regulate and control the importation of intoxicating liquor because of the registration or nonregistration in the Patent Office of the trade-name which is applied to it. If we were convinced that the statute here in question had any reasonable relation to the regulation or control of the liquor traffic within the state of Minnesota, we would unhesitatingly dismiss these suits. If there in fact exists a reasonable basis for permitting the importation of the

same kind and quality of liquor bearing an unregistered brand or a brand which is not subject to registration, we are unable to visualize it. We can see a relation between the United States Pure Food and Drug Act (as amended, 21 U. S. C. A. Sec. 1 et seq.) and the kind of liquor which is offered to the public for consumption, but we can see no relation between the laws of the United States which permit the registration of certain tradenames in the Patent Office and the kind and quality of liquor which is offered to the public.'

Legislation of the type here challenged has been before this Court on a number of occasions. In the case of *Liggett Co. vs. Baldridge,* 278 U. S. 105, a Statute was involved which prohibited the ownership of a pharmacy or drug store by a corporation whose stockholders were not all registered pharmacists. That Statute was held arbitrary and unreasonable. During the course of the opinion the Court said:

"It, therefore, will be seen that without violating laws, the validity of which is conceded, the owner of a drug store, whether a registered pharmacist or not, cannot purchase or dispense impure or inferior medicines; he cannot, unless he be a licensed physician, prescribe for the sick; he cannot, unless he be a registered pharmacist, have charge of a drug store or compound a prescription. Thus, it would seem, every point at which the public health is likely to be injuriously affected by the act of the owner in buying, compounding, or selling drugs and medicines is amply safeguarded.

The act under review does not deal with any of the things covered by the prior statutes above enumerated. It deals in terms only with ownership. It plainly forbids the exercise of an ordinary property right, and, on its face, denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit

lawful occupations or impose unreasonable and unnecessary restrictions upon them.' (Citing cases)

In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion. It is a matter of public notoriety that chain drug stores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years. We take judicial notice of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered pharmacists. If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the 14th Amendment."

The above decision is particularly applicable here. From the language above quoted, it appears that pharmacists were registered and their activities thoroughly controlled and limited. As the Court said:

"Every point at which the public health is likely to be injuriously affected by the act of the owner in buying,

compounding or selling drugs and medicines is amply safeguarded."

In the instant case, the public health is likewise amply safeguarded by the General Liquor Control Statutes and the rules promulgated thereunder which require the recording of brands and the filing of a chemical analysis of the same with the Liquor Control Commissioner.

In the Liggett case the Court held:

"The act under review does not deal with any of the things covered by the prior statutes above enumerated."

In the instant case, the Statute here questioned does not deal with the same subject matter as the Liquor Control Statute, except to the extent that it requires a limited number of brands only to be registered in the Patent Office.

In the recent case of *Mayflower Farms vs. Ten Eyck*, 297 U. S. 266, the Court had before it for consideration a Statute of the State of New York, reading as follows:

"It shall not be unlawful for any milk dealer who (at the time this act shall take effect is) *since April tenth, nineteen hundred thirty-three has been* engaged *continuously* in the business of purchasing and handling milk not having a well-advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, *and such lower price shall also apply on sales from stores to consumers;* provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed (by the board) for such sales to stores in such a city."

The above Statute does not involve the registration of a brand, but does include as a controlling factor the not having of a "well-advertised trade name." The difference between the two does not seem material.

With reference to the above Statute, the Court said at Page 272 of the opinion:

> "The appellant had not a well-advertised trade name. The reason for refusing it a license was that though it had not been continuously in the business of dealing in milk since April 10, 1933, it had sold and was selling to stores milk at a price a cent below the established minimum price. The question is whether the provision denying the benefit of the differential to all who embark in the business after April 10, 1933, works a discrimination which has no foundation in the circumstances of those engaging in the milk business in New York City, and is therefore so unreasonable as to deny appellant the equal protection of the laws in violation of the Fourteenth Amendment.
>
> The record discloses no reason for the discrimination."
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> * * *
>
> "The appellees do not intimate that the classification bears any relation to the public health or welfare generally; that the provision will discourage monopoly; or that it was aimed at any abuse, cognizable by law, in the milk business. In the absence of any such showing, we have no right to conjure up possible situations which might justify the discrimination. The classification is arbitrary and unreasonable and denies the appellant the equal protection of the law."

In the above opinion, the Court emphasized the absence of facts to justify the discrimination.

In the recent case of *Hartford S. B. I. & Ins. Co. v. Harrison,* 301 U. S. 459, the Court considered a Statute of Georgia, which discriminated between resident and non-resident insurance agents. To sustain the act, the difference between mutual and stock companies was urged as a basis for classification. The law was held to violate the Fourteenth Amendment. The Court said at Page 463 of the opinion:

> "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."
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> * * *
>
> "It is idle to elaborate the differences between mutual and stock companies. These are manifest and admitted. But the statutory discrimination has no reasonable relation to these differences. We can discover no reasonable basis for permitting mutual insurance companies to act through salaried resident employes and exclude stock companies from the same privilege. If there were any such basis, it would have been discovered by the state courts. The trial court said there was none. Two Justices of the Supreme Court were of the same opinion. The prevailing opinion in that court fails to disclose any good reason for the discrimination. The diligence of counsel for appellee has not been more successful. Thus the efforts in the state courts, and here, to find support for the statute have conspicuously failed."

The absence of facts to justify the discrimination is as apparent in the instant case as in the above decisions. There is nothing to indicate that an evil existed or might arise to make the Statute necessary or desirable. There is no evidence in the record that even remotely shows the relationship between the Statute and public health, morals, safety or general welfare.

The Statute is not a revenue measure. It does not impose any license requirements, nor is it an inspection Statute.

Nothing therein contained has anything to do with the character or quality of the liquor imported into the State. No distinction is made between deleterious and pure products. They may contain 25% of alcohol by volume or any greater quantity without limit. No assurances of safety from their use are afforded. The branded bottle is fraught with good or evil, to the same extent as one without a label. If a question of morals is involved, it arises from the use of the liquor rather than from the container or the brand it wears.

It cannot be claimed that the Statute is designed to prevent monopoly. On the contrary, monopoly is bound to result from its enforcement. The owner of the registered brand is given the exclusive right to import. The resident-manufacturer is given a monopoly of the brands which cannot be registered. As before pointed out, he may appropriate the brands of others without being answerable in law or equity.

III.

CONCLUSION.

The Twenty-first Amendment did not remove the restrictions imposed by the Fourteenth Amendment upon the police power of the States.

The Statute here challenged denies to the appellee the equal protection of the laws and is null and void.

That the decree of the lower Court should be affirmed is respectfully submitted.

CARL W. CUMMINS,
RAY E. CUMMINS,
of St. Paul, Minnesota,
Attorneys for Appellee.